IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 30TH MARCH 2007 / 9TH CHAITHRA 1929

SA.No. 703 of 1993(A)

AS.161/1992 of ADDL.DISTRICT COURT, THALASSERY
OS.149/1991 of II ADDL.SUB .COURT.,THALASSERY

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APPELLANT/RESPONDENT/PLAINTIFF:

PALLANNOORIDATHIL GOVINDAN NAMBIAR
S/O.KANNAN NAMBIAR, AGED 65 YEARS
RETIRED TEACHER, RESIDING AT KEEZHALLUR AMSOM
KOLTHERI DESOM
TELLICHERRY TALUK.

BY ADV. SRI.A.MOHAMED MUSTAQUE
SRI.SHEJI P.ABRAHAM

RESPONDENT/APPELLANT/DEFENDANT

KARIYIL KAPPADAN GOPALAN NAMBIAR,
S/O. KANNAN NAMBIAR, 55 YEARS
AGRICULTURIST, RESIDING AT KEEZHALLUR
AMSOM, KOLTHERI DESOM, TELLICHERRY.

BY ADV. SRI.T.A.RAMADASAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 30/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON CMP NO. 1713/1993 IN SA 703/1993

DISMISSED

30.3.2007 SD/- M.SASIDHARAN NAMBIAR, JUDGE

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M.SASIDHARAN NAMBIAR, J.

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S.A.No. 703 OF 1993

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DATED THIS THE 30TH DAY OF MARCH, 2007

JUDGMENT

Plaintiff in O.S.149 of 1991 on the file of Sub Court, Thalassery is the appellant. Defendant therein is the respondent. Suit is one for permanent prohibitory injunction. Plaint schedule property as described in the plaint, is four acre twenty three and a half cents within the boundaries shown therein and comprised in resurvery No.3/1D of Keezhallur Village of Thalassery Taluk. Admittedly the property belonged in jenmom of Pulleri Illom. The case of appellant and respondent, his brother in law, is common to certain extent. Under Ext.A1 dated 12.5.1956, three taks of the property were obtained jointly by appellant and respondent. Thereafter, under Ext.A2 partition deed, the property obtained under Ext.A1 was divided into two parts, namely eastern part and a western part. The eastern part was alloted to the plaintiff and western part, to the defendant. Item No.1 therein is the property alloted to the plaintiff and item No.2 is the property alloted to the defendant. While the extent of the property alloted to the plaintiff is three acre ninety five cents, the extent of the property alloted to

defendant was four acre twelve cents. The right and possession of the respective properties alloted under Ext.A1 is not in dispute. The case of the appellant in the plaint was that after the partition under Ext.A2, certain properties were taken on oral lease by plaintiff and defendant together and portions of that property is in their respective possession and thus plaintiff is having four acre twenty three and a half cents in his possession and defendant, four acre forty and half cents. It was contended that out of four acre forty and half cents, defendant sold one acre to Devaki and is now in possession of three acre forty and half cents only and plaintiff is in possession of the plaint schedule property. Contending that there is a boundary wall differentiating the property of the plaintiff and defendant to a total length of 113.2 metres having a height of two and half feet and defendant is trying to trespass into the plaint schedule property and demolish the boundary wall, the suit was filed. Plaintiff sought a decree for permanent prohibitory injunction restraining defendant from demolishing the boundary wall on the north of plaint schedule property and also from trespassing into the plaint schedule property.

2. Defendant filed a written statement contending that

after Ext.A2 partition deed, there was no joint entrustment to the plaintiff and the defendant as alleged. It was contended that apart from four acre twelve cents obtained by him under Ext.A2, he had fifty cents of the property as per an oral lease granted by the jenmi in 1979 and he has been in possession of the said property and appellant has constructed a compound wall enclosing the fifty cents belonging to him and he is not entitled to the decree sought for.

3. Though a Commission was appointed, the Commissioner submitted Ext.C1 report, after inspection without notice to the defendant, stating that the property could not be identified and the plaintiff had shown him a compound wall. The plaintiff was examined as PW1 and the Commissioner was examined as PW2. The defendant was examined as DW1. Exts.A1 to A4 and B1 to B5 were marked. Learned Sub Judge, on the evidence, found that evidence of DW1 and the contention in the written statement show that appellant is in possession of fifty cents of property which the defendant contended was trespassed upon by appellant. Relying on the decision of this court in Vasudeva Kurup V. Ammini Amma(1964 KLT 468) it was held that even if in wrongful possession, appellant is entitled to maintain his

possession. Hence a decree for injunction was granted. Defendant challenged the decree and judgment before District Court, Thalassery in A.S.161 of 1992. Learned Additional District Judge, on re-appreciation of evidence, holding that the relief of injunction is an equitable and discretionary relief found that appellant did not establish the case alleged in the plaint, and so he is not entitled to the decree granted by the trial court. Appeal was allowed, decree granted was set aside and the suit was dismissed. It is challenged in the Second appeal.

4. Before admitting the second appeal, notice was ordered to the respondent and records were called for.

5. Learned counsel appearing for appellant and respondent were heard.

6. Under Ext.A1, admittedly appellant and respondent together obtained three taks of property comprised in R.S.No.36/3. The extent shown is ten acres. Thereafter, under Ext.A2 partition deed, the properties in their possession as obtained under Ext.A1 were divided into two portions. Item No.1 being the eastern portion of the property was alloted to the appellant and item No.2 being the western portion was alloted to the respondent. The extent of item No.1 is three acre ninety

five cents and that of item No.2, four acre twelve cents. Parties have no dispute with regard to right, title and possession of the respective parties to the respective extent of the property as alloted in Ext.A2 and within the boundaries shown therein.

7. What was contended by appellant in the plaint was that after Ext.A2 partition deed appellant and respondent together obtained additional property on oral lease and thus appellant has been in possession of a total extent of four acre twenty three and a half cents and respondent, a total extent of four acre forty and half cents. It is to be borne in mind that there is no case for the appellant that though the extent of the properties shown in Ext.A2 is not correct and within the boundaries shown therein, the extent is more. On the other hand, it is the specific case that the extent of the property shown in Ext.A2 is correct and additional land was obtained thereafter as per an oral arrangement and the respective additional extent is in the possession of the appellant and respondent. If that be the case, the boundaries of the plaint schedule property can never be the same boundary of item No.1 shown in Ext.A2. If appellant had obtained any other property apart from the property obtained as item No.1 of Ext.A2 property, that property could either be on

the east, west, north or south of item no.1 obtained under Ext.A2 or scattered around all the four sides of that property. In any case, if the extent shown in Ext.A2 partition deed within the boundaries is correct, and the case of appellant is that additional extent was thereafter obtained, then the boundaries of the plaint schedule property can never be the same boundaries shown to item No.1 of Ext.A2 partition deed. The boundaries shown in the plaint are the exact replica of the boundaries of item No.1 of Ext.A2 partition deed. If that be the case, it needs no further explanation to hold that plaint schedule property can only be three acre ninety five cents obtained as item No.1 of Ext.A2 partition deed. If so the extent of property can only be three acre ninety five cents. If so, the additional extent claimed by appellant and decree sought for in respect of the additional extent, could never be part of the plaint schedule property as that property can only be outside the plaint schedule property. If that be the case, for that sole reason appellant is not entitled to the decree sought for as the relief sought for is not in respect of the property obtained under Ext.A1, but the additional extent. It is more so because appellant has no case that respondent is disputing his right or possession over the property obtained

under Ext.A1.

8. Learned Additional District Judge, on appreciation of the evidence, found that being an equitable and discretionary relief, when appellant did not approach the court disclosing the true facts, he is not entitled to the decree for injunction. Learned counsel appearing for the appellant relying on the decision of the Supreme Court in Rame Gowda V. M.Varadappa Naidu (2004(1) SCC 769) argued that a person who is in settled possession of the property, even if in wrongful possession is entitled to a decree for injunction even against the true owner as he cannot be thrown out of possession other than by due process of law and pointed out that the written statement filed by respondent and evidence of PW1 establish that the disputed portion of the property was trespassed upon by appellant and is in his possession and therefore being in settled possession of that portion of the property, appellant is entitled to the decree and first appellate court should not have interfered with that decree. Learned counsel appearing for respondent pointed out that the allegation in the plaint was that respondent is trying to demolish the northern boundary and as per the boundaries, respondent has no property to the north and his property lies to

the west and therefore the very case of apprehension of demolition of northern boundary is unbelievable and first appellate court properly appreciated the evidence and in such circumstances appellant is not entitled to the decree sought for.

9. True, even a person in wrongful possession of the property is entitled to get a decree for injunction against true owner from forcible eviction provided he is in settled possession of the such property. The question is whether there is any evidence with regard to settled possession. First of all, as stated earlier, the plaint schedule property as now stands is only item No.1 of Ext.A2 partition deed. Appellant has no case that within the four boundaries shown therein more extent than what is shown in Ext.A2 is there. Even appellant has no case that he is in possession of any part of the property alloted to respondent under Ext.A2, respondent did not admit that any part of his property obtained under Ext.A1 was in the possession of appellant. Even if it is taken that in the written statement respondent admitted possession of fifty cents of the property which was not divided under Ext.A1 so long as the suit property is item No.1 of Ext.A1 partition deed and not the additional extent, appellant is not entitled to the decree on the alleged

admission. Moreover, the admission does not establish a settled possession. In such circumstances first appellate court rightly held that appellant is not entitled to the equitable relief of decree for injunction. I find no substantial question of law involved in the appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-